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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-398

WAIT RADIO, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 459 F.2d 1203. The opinions of the Federal Communications Commission (Pet. App. 16a-37a) are reported at 22 F.C.C. 2d 934 and, on reconsideration, 25 F.C.C. 2d 1016.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1972, and a petition for rehearing was

denied on April 26, 1972. On July 20, 1972, the Chief Justice granted an extension of time in which to file a petition for certiorari to and including September 8, 1972. The petition was filed on the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court below properly affirmed the Commission's denial of a request for waiver of its clear channel and nighttime broadcast rules after finding that the Commission's action was not arbitrary, irrational, or an abuse of discretion.

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law * * * abridging the freedom of speech * * *."

STATEMENT

Petitioner is licensed to operate a daytime AM radio station on the 820 kHz channel in Chicago, Illinois. In 1967, petitioner applied to the Federal Communications Commission for permission to broadcast on the 820 kHz channel at night. This application of necessity included a request for waiver of the Commission's clear channel and nighttime broadcast rules, 47 C.F.R. 73.21, 73.22, 73.24(b)(3), and 73.25. The clear channel rules provide that certain channels,

including the 820 kHz channel, are each restricted to one nighttime broadcaster in the continental United States. These rules were promulgated to protect the signals of certain designated clear channels at night, so that radio service may be provided to remote areas which, because of their sparse population, cannot support local AM radio stations.[1] The additional nighttime broadcast rule provides that any station seeking new nighttime authorization must demonstrate, *inter alia*, that its signal will "provide a first primary AM service to at least 25 percent of the area within the proposed interference-free nighttime service area or at least 25 percent of the population residing therein." 47 C.F.R. 73.24(b)(3)(ii). The purpose of this rule is to limit additional broadcast interference on the saturated AM frequency band.

The Commission rejected petitioner's application, 10 F.C.C. 2d 481, reconsideration denied, 11 F.C.C. 2d 547, and the court of appeals remanded the case to the Commission for further consideration, 418 F. 2d 1153. On remand the Commission found that

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[1] The clear channel broadcasters are able to reach these remote areas at night via "skywave" signals which are reflected back to earth off layers of the upper atmosphere. Such signals are absorbed, and not reflected back, during the day. Nighttime broadcast duplication on a channel "dilutes the effective range of * * * skywave propagation to distant rural areas * * *" (Pet. App. 3a). See *Clear Channel Broadcasting*, 31 F.C.C. 565, affirmed *sub nom. The Goodwill Stations, Inc.* v. *Federal Communications Commission*, 325 F. 2d 637 (C.A. D.C.).

waiver of the clear channel and nighttime broadcast rules on behalf of petitioner was not appropriate for several reasons, including the facts that (1) petitioner's proposed nighttime broadcast signal would cause substantial interference with the signal of the primary broadcaster on the 820 kHz channel over a large area with a population of more than two million, (2) its proposed signal would also cause interference with the signals of two broadcasters on the 810 kHz and 830 kHz channels, (3) petitioner's nighttime signal would not provide any significant population or area with a first primary AM service since there are already 25 nighttime broadcasters serving the population and area that would be reached by petitioner's nighttime signal, and (4) granting petitioner's request for waiver would hamper the Commission in making future allocations regarding nighttime broadcasting on the 820 kHz channel.

Petitioner sought reconsideration, offering to accept a conditional waiver of the rules under which it would agree to cease nighttime broadcasting upon a final Commission order authorizing another station to operate on the 820 kHz channel. The Commission again denied petitioner's application, determining that even a conditional waiver would to some extent impair the Commission's flexibility in dealing with future applications and holding that petitioner had in any event failed to establish that waiver of the clear channel and nighttime broadcast rules in its behalf would serve the public interest.

The court of appeals affirmed in an opinion which carefully reviewed the considerations which led the

Commission to deny petitioner's application and found that the Commission's denial was neither contrary to law nor an abuse of discretion.

ARGUMENT

As petitioner recognizes, "[t]he sole issue [before the Commission was] one of deciding whether on the facts presented the clear channel [and nighttime broadcast] rules should be waived in this specific case * * *" (Pet. 8). The Commission decided this issue adversely to petitioner. The court of appeals found that the Commission's decision was not contrary to law and was not arbitrary, irrational, or an abuse of discretion, and petitioner does not contest this finding. Petitioner urges (Pet. 7-11), however, that there are First Amendment considerations inherent in this case which require "closer judicial scrutiny and an insistence of higher standards of rationality" (Pet. 8). In effect, petitioner contends that a court, in approving a Commission decision respecting frequency allocation, must determine not only that the Commission's decision was within its statutory authority and had a rational basis in the record but also that the court itself would have reached the same decision. This contention, which overlooks the value of Commission expertise in frequency allocation matters, is contrary to the decisions of this Court.

This Court has long recognized that First Amendment considerations do not preclude effective regulation of the allocation of broadcasting frequencies. As

the Court stated in *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 386: "Although broadcasting is clearly a medium affected by a First Amendment interest, * * * differences in the characteristics of new media justify differences in the First Amendment standards applied to them." The Court observed that "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Id.*, at 388. This is necessarily the case, because there are simply too many persons desiring broadcast licenses and too few available frequencies.[2] "It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum." *Id.*, at 389.

Congress has committed the task of "choosing from among the many who apply" to the Commission and has established the "public interest, convenience, or necessity" as the criterion for the exercise of its delegated authority. *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 216. This Court has long held that this statutory standard is constitu-

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[2] In the presently congested AM band, approximately half of the more than 4,000 licensed broadcasters must go off the air at night to prevent interference and to allow persons in sparsely populated areas to receive adequate signals. Petitioner contends, in effect, that under the First Amendment there is a presumption, to be litigated in the courts, that all of these stations should be able to broadcast at night.

tionally permissible and that "[d]enial of a station license on that ground, if valid under the Act, is not a denial of free speech." *Id.*, at 227.

The application of this standard requires the exercise of discretion by the Commission. Accordingly, in reviewing Commission decisions applying the standard, the courts traditionally determine whether the Commission's action was arbitrary, capricious or otherwise an abuse of discretion. See, *e.g.*, *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223, 226-227. This approach has been applied to Commission decisions involving certain programming matters, *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, and *National Broadcasting Co.* v. *United States*, 319 U.S. 190; to decisions on whether a license application should be granted, *e.g.*, *Henry* v. *Federal Communications Commission*, 302 F. 2d 191, 194 (C.A. D.C.), certiorari denied, 371 U.S. 821; and to Commission rules limiting the number of stations an individual or company can own, cf. *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 204. Essentially the same standard of review has been applied in a long series of cases which have affirmed Commission decisions refusing to waive frequency allocation rules. See, *e.g.*, *Industrial Broadcasting Co.* v. *Federal Communications Commission*, 437 F. 2d 680 (C.A. D.C.); *560 Broadcast Corp.* v. *Federal Communications Commission*, 418 F. 2d 1166 (C.A. D.C.); *Rio Grande Family Radio Fellowship, Inc.* v. *Federal Communications Commission*, 406 F. 2d 664 (C.A. D.C.); *Chambers-*

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

THOMAS E. KAUPER,
Assistant Attorney General.

CARL D. LAWSON,
Attorney.

JOHN W. PETTIT,
General Counsel,

JOSEPH A. MARINO,
Associate General Counsel,

CHARLES M. FIRESTONE,
Attorney,
Federal Communications Commission.

OCTOBER 1972.

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